and which the parties, exercising reasonable diligence, might have brought forward at the time.

In my judgment, there is no running away from the fact that every point was considered by the plaintiffs and the defendants before they entered into the consent order. With reasonable diligence, the plaintiffs should forsee the obstacles ahead and come up with a good formula to settle the case once and for all. There was no error in expressing the intention of the Court when the consent order was drawn up. Everything was laid on the table. Consequently, the plaintiffs are now estopped by conduct from seeking to have the consent order varied.

However, in the course of the arguments, Haji Mohamed Asri relents and concedes that there was a common mistake between the parties especially in regard to the powers of the Malay Chambers of Commerce (Headquarters) as stated in the early part of this judgment, but he submits that the plaintiffs ought to file a fresh action.

Finally, Encik Abdul Aziz Wahab submits that the plaintiffs are barred from coming before the same Court as the Court is already *functus officio* when it has already made a final pronouncement on the rights of the parties appearing before it so as to bring all proceedings to an end. But this must, in my view, be distinguished from orders which are in the nature of directions which can be varied by the same Court as the Court is not *functus officio.* Clearly from the facts, both parties had settled the differences between them and had appointed the Malay Chambers of Commerce (Headquarters) to be their mediators in validating the list of membership of the Perak Malay Chambers of Commerce and giving them the mandate to organise a fresh 19th Annual General Meeting of the Perak Malay Chambers of Commerce, etc..

For the reason adumbrated above, I dismissed the plaintiffs' application (enclosure 45A) with costs.

HUA JOO DEVELOPMENT CO. SDN. BHD

v.

SURVEY DEVELOPMENT SERVICE

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[CIVIL APPEAL NO. KG.13 OF 1992 (I)]
4 SEPTEMBER 1993

EVIDENCE: Adducing evidence on appeal - Principles involved - Whether the requirement of special grounds for the admission of further evidence applies in an appeal from a lower Court to the High Court.

At the commencement of the hearing of the appeal against the decision of the Sessions Court striking out the defence of the defendant, the plaintiff applied to admit in evidence a fresh affidavit to which application the defendant objected.

The question that arose was whether the conditions for the admission of further evidence on appeal laid down in *Ladd v. Marshall* [1954] 1 WLR 1489 applied in an appeal from a subordinate Court to the High Court and if so whether the plaintiff had satisfied the said conditions.

Held:

[1] The conditions for the admission of further evidence on appeal laid down by *Ladd v. Marshall (supra)* namely that it must be shown that the further evidence:

(a) could not have been obtained with reasonable diligence for use at the trial;
(b) is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and
(c) must be apparently credible though it need not be incontrovertible,

applies in the case of an appeal from a subordinate Court to the High Court.

[2] It was not satisfactorily shown that the further evidence sought to be admitted could not have been obtained with reasonable diligence for the hearing in the lower Court. In the circumstances the plaintiff has failed to satisfy the conditions laid down in *Ladd v. Marshall* for the admission of further evidence and the affidavit which had already been filed with the

Court Registry must be excluded for the purpose of the appeal.

[Plaintiff's application refused].

Cases referred to:
Standard Chartered Bank v. Kentland Sdn. Bhd. & Anor. [1989] 1 CLJ 1126 / [1990] 2 MLJ 319 ***(dist)***
Ladd v. Marshall [1954] 1 WLR 1489 ***(foll)***
United Asian Bank Bhd v. Bhassie [1991] 1 CLJ 827 / [1991] 2 MLJ 122 ***(refd)***
Yah binti Aji v. Fatimah binti Haji Mohamed Ariffin & Ors. [1969] 2 MLJ 186 ***(refd)***
Lim Hee Chuan v. Toh Phaik Har (f) [1949] 15 MLJ 92 ***(refd)***
Shedden v. Patrick LRI Sc 470 ***(refd)***
Nash v. Rochford Rural Council [1917] 1 KB 393 ***(refd)***
Leng Lan v. S.M. Yesudian [1939] MLJ Rep. 222 ***(refd)***
Shaik Sahied bin Abdullah Bajarie v. Mootoo Carpen Chitty 2 MC 16 ***(refd)***
Kiu May Construction Co Ltd v. Wai Cheong Co. Ltd. & Anor. 29 BLR 137 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 29, 69(1), (3)
Rules of the High Court 1980, O. 14, O. 18 r. 19, O. 41 rr. 5(1) & 11(1), O. 56 r. 2

For the appellant - Fabian Lim; M/s. Chua Khaider Lim & Co.
For the respondent - Maria Kana; M/s. Foo Kana & Co.

JUDGMENT

Chong Siew Fai J:
At the commencement of the hearing of this appeal against the decision of the Sessions Court, Kuching, given on 31 May 1992 striking out the defence of the defendant/ appellant and allowing judgment to be entered for the plaintiff/respondent, an oral application was made on behalf of the plaintiff/respondent to admit in evidence a fresh affidavit of one Dennis N.L. Chong affirmed on 25 June 1993. The defendant/appellant objected to the application. Obviously this affidavit was in point of time, made after the delivery of the decision now appealed against, and the admission of the affidavit in evidence would amount to adducing further evidence at the appellate stage.

For the plaintiff/respondent (hereinafter referred to as the applicant) learned Counsel relied on *Standard Chartered Bank v. Kentland Sdn. Bhd. & Anor.* [1990] 2 MLJ 319 in which *Ladd v. Marshall* [1954] 1 WLR 1489 was distinguished and held not relevant. The former case was an appeal from the decision of the Senior Assistant Registrar to the Judge in Chambers dismissing the application for summary judgment under O. 14 and for striking out the defence under O. 18 r.19. In our present case the appeal is from the decision of the Sessions Court striking out the defence and allowing judgment to be entered.

By s. 29 of the Courts of Judicature Act 1964 all civil appeals from a subordinate Court to the High Court shall be by way of re-hearing, and on the hearing of such appeals the High Court shall have the like powers and jurisdiction as the Supreme Court has on the hearing of appeals from the High Court. It is therefore necessary to examine the powers and jurisdiction of the Supreme Court. Section 69(1) of the said 1964 Act provides, *inter alia*, that the Supreme Court on hearing appeals from the High Court shall have full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Of particular interest for our purpose, however, is subsection (3) of the said s. 69 which enacts:

> Upon appeals from a judgment, after **trial or hearing of any cause or matter** upon merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Supreme Court.
> (Emphasis added).

Does the requirement of special grounds for the admission of further evidence apply in an appeal to the High Court?

In *Ladd v. Marshall* [1954] 1 WLR 1489 C.A. it was held that leave to adduce further evidence before the Court of Appeal (English) will only be granted if the following 3 conditions are satisfied. It must be shown that the further evidence:

(1) could not have been obtained with reasonable diligence for use at the trial;
(2) is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and
(3) must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible.

The above principle for the admission of further evidence has been adopted by our Federal Court and Supreme Court in numerous cases.

But even at the High Court level, the same conditions had been applied. In *United Asian*

Bank Bhd v. Bhassie [1991] 2 MLJ 122 an application for striking out and dismissal of the defendant's defence and counterclaim was dismissed after hearing in chambers. Upon adjournment into open Court under O. 56 r. 2, the plaintiff sought to introduce a new affidavit. Zakaria Yatim J. applied the 3 conditions laid down in *Ladd v. Marshall, supra* and disallowed the application. If the 3 conditions were applicable in a hearing adjourned into Court under O. 56 r. 2, all the more reason that they should apply on an appeal from the lower Court. Besides, in *United Asian Bank Bhd v. Bhassie, supra,* the application for striking out the defence and counterclaim was refused, whereas in the instant case under appeal, judgment was given to the applicant - a situation rendering all the more plausible that the conditions in *Ladd v. Marshall, supra,* should apply since the further evidence sought to be admitted is to reinforce grounds for sustaining the judgment given.

In *Yah binti Aji v. Fatimah binti Haji Mohamed Ariffin & Ors.* [1969] 2 MLJ 186, Chang Min Tat J. refused to admit further evidence on the ground that it had not been shown that such further evidence could not have been obtained with reasonable diligence for use at the trial (the above condition (1) in *Ladd v. Marshall, supra*). In that case, the High Court was exercising its original jurisdiction. The applicants/defendants sought to adduce the further evidence after the close of their case, that is, before the conclusion of the whole case in the sense that judgment had been delivered. Our instant case is an appeal from the lower Court. There is therefore stronger reason that the principle governing admission of further evidence should apply.

Even before *Ladd v. Marshall, supra* decided in 1954, the High Court had consistently required special grounds for admission of fresh evidence on appeal. Thus in *Lim Hee Chua v. Toh Phaik Har (f)* [1949] 15 MLJ 92, an appeal from the Magistrates' Court, Bostock Hill J. after considering some authorites, notably *Shedden v. Patrick* L.R.I. Sc 470 and *Nash v. Rochford Rural Council* [1917] 1 KB 393, spoke of:

> the general principle that the Courts are very reluctant to give any litigant a second chance to adduce at a later stage evidence that was in his possession in the lower Court ...

In *Leng Lan v. S.M. Yusudian* [1939] MLJ Rep. 222 Aitken J., commenting upon an applicant's attempt to adduce additional evidence in the review of an order of Court or in an appeal, remarked:

> In either case he will have to satisfy the Court that the additional evidence he desires to adduce was not within his knowledge, or could not be produced by him at the trial, in spite of the exercise of due diligence on his part.

In *Shaik Sahied bin Abdullah Bajarie v. Mootoo Carpen Chitty* 2 MC 16, on an originating summons being adjourned into Court for argument, one of the matters for decision was the admission of further evidence. Hyndman-Jones CJ said (Page 23):

> I am of opinion that the principles on which the Court should act in this matter are analogous to those which should guide the Court of Appeal in dealing with an appeal, and during the argument I drew attention to the case of *In re Copiano Mining Co, Ltd. 10 TLR 180* which decided that as a rule, evidence which could have been adduced before that Court ought not to be allowed to be brought forward as additional evidence before the Court of Appeal: at any rate without showing special grounds of an exceptional nature.

On the above authorities, it is my view that for the admission of further evidence in an appeal from a subordinate Court to the High Court, the conditions laid down in *Ladd v. Marshall, supra,* apply.

I shall now consider the facts and circumstances of the present case under appeal.

In the new affidavit sought to be admitted in evidence, Dennis N.L. Chong purports to confirm himself being the author of letter dated 10 September 1991 (Exh. D1) exhibited in Francis Chai Sin Fatt's affidavit made on 27 September 1991. He also purports to "confirm and reiterate the contents" of the said letter.

In the new affidavit, the said Dennis Chong also stated that he had moved to Canada on or about June, 1989 and had been residing there since. He further said that because of the constraints of time and distance, he was unable to depose to an affidavit and had thought that a letter like Exh. D1 would suffice.

To begin with, I do not think the evidence adduced as constituting grounds for seeking admission of fresh evidence **and** the fresh evidence sought to be admitted should be incorporated in the same affidavit. The 2 types of

evidence are distinct and serve different purposes. Once the fresh testimony is admitted (i.e. assuming it is admitted), the former evidence constituting grounds for its admission is no longer of any relevance. Such evidence, therefore, should be contained in a separate document (e.g. a separate affidavit) prepared in support of the application to admit new evidence.

Next, I am not satisfied that the further evidence now sought to be admitted could not have been obtained with reasonable diligence for the hearing in the lower Court in March 1992. The plaintiff's/respondent's application for striking out the defence was dated 11 March 1991. Between then and January 1992 there were 4 affidavits from both sides. In the letter Exh. D1, Dennis Chong admitted being in Kuching in August 1991. There was, therefore, opportunity for the plaintiff to adduce, by affidavit, whatever evidence required from Dennis Chong and the assertion of Dennis Chong in his affidavit made on 25 June 1993 that owing to "constraints of time and distance" he "was unable to depose to an affidavit to the same effect in the first place" was far from being satisfactory.

For the applicant, Miss Maria contended that at the time Francis Chai Sin Fatt made the affidavit on 27 November 1991, Dennis Chong was in Canada. I am not attracted by the argument. Francis Chai's said affidavit answered that of Sim Chio Huat affirmed on 17 July 1991. As admitted by Dennis Chong in his letter dated 10 September 1991 (Exh. D1 exhibited in Francis Chai's affidavit), Sim's said affidavit of 17 July 1991 had been shown to him while he was in Kuching in August 1991. It is therefore obvious that Dennis Chong had had the opportunity to make an affidavit in answer.

Furthermore, an affidavit should contain facts that are admissible (O. 41 r. 5(1)) and not merely "reiterate" the contents of the deponent's letter that contains numerous facts and matters, though documents intended to be used in connection with an affidavit may be exhibited (O. 41 r. 11 (1)).

For the applicant, Miss Maria relied on 2 cases in support of her contention that the fresh affidavit evidence was admissible: *Kiu May Construction Co. Ltd v. Wai Cheong Co. Ltd. & Anor.* 29 BLR 137 (Hong Kong case) and *Standard Chartered Bank v. Kentland Sdn. Bhd. & Anor.* [1990] 2 MLJ 319. *Kiu May Construction Co. Ltd. & Anor., supra,* in my opinion is clearly distinguishable. There the new evidence sought to be admitted contained in part documents that came into existence **after** the hearing of the decision appealed against, and in part 3 additional documents which the appellate Court considered to be "of no significant relevance" although they were in existence at the date of the hearing of the decision appealed against. (See Page 142 of the Report). As to the case of *Standard Chartered Bank v. Kentland Sdn. Bhd. & Anor., supra,* it should, in my opinion, be considered on its particular facts and circumstances. Also, there the learned Judge seemed to be drawing a distinction between an appeal from a lower Court to an appellate Court and an appeal from the decision of a Senior Assistant Registrar to the Judge in chambers. That case fell within the latter category. Our present appeal is against the decision of a subordinate Court. As I have held above, the principle in *Ladd v. Marshall, supra,* governing the admission of further evidence applies.

For the above reasons, the application is refused, and, for the purpose of this appeal, the affidavit affirmed by Dennis Chong on 25 June 1993, which has already been filed with the Court registry, must be excluded.